STATE OF NORTH CAROLINA	**IN THE OFFICE OF ADMINISTRATIVE HEARINGS**
COUNTY OF WAKE	**08 EDC 2231**

Father and *Mother*, by and for *Student*, Petitioners,	)	
v.	)	**FINAL DECISION by SUMMARY JUDGMENT**
Wake County Public Schools, Respondent.	)	

THIS CAUSE comes before the undersigned Administrative Law Judge on Respondent's Motion for Summary Judgment. After taking full consideration of all arguments presented by counsel for both parties, all documents in support of or in opposition to the Motion for Summary Judgment, and all filings by both parties, including but not limited to Respondent's Motion for Summary Judgment, Respondent's Memorandum of Law in Support of Respondent's Motion for Summary Judgment and Reply Brief in Support of Motion for Summary Judgment, Petitioners' Motion in Opposition to Summary Judgment, Memorandum of Law for Motion in Opposition to Summary Judgment, and Supplemental Memorandum of Law in Opposition to Summary Judgment, as well as all exhibits and affidavits, the Undersigned is of the opinion that Respondent's Motion for Summary Judgment should be granted and hereby makes the following Findings of Fact and Conclusions of Law.

STANDARD OF REVIEW

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. " N.C. R. Civ P. 56(c) (2008). Summary judgment "is designed to eliminate the necessity of a formal trial where only questions of law are involved." *Dalton v. Camp*, 353 N.C. 647, 650, 548 S.E.2d 704, 707 (2001).

"The moving party has the burden of establishing the lack of any triable issue of fact." *Draughon v. Harnett County Bd. of Educ*., 158 N.C. App. 208, 580 S.E.2d 732 (2003). "The showing required for summary judgment may be accomplished by proving an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of her claim."

Dobson v. Harris, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (internal citations omitted). "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Dalton*, 353 N.C. at 651, 548 S.E.2d at 707. "Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664 (2000). A party opposing a properly supported motion for summary judgment must present significant probative evidence to support the Petition, especially when the non-moving party bears the burden of proof. A genuine issue of material fact is not created where a party submits an affidavit contradicting his own prior deposition testimony. *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984); *see also Hot Wax, Inc. v. Warsaw Chem. Co.*, 45 F. Supp. 2d 635, 638 (N.D. Ill. 1999).

FINDINGS OF FACT

The following are undisputed material facts upon which the Undersigned has based this decision:

1. Respondent Wake County Board of Education is a local education agency (LEA) receiving funds under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, (IDEA).

2. Petitioner *Student* enrolled as a freshman at LR High School (ABHS) in the Wake County Public School System (WCPSS) in July 2005.

3. *Student* has never been identified as a student with special needs nor been identified as eligible for special education services under the IDEA by any public or private school. *Student* never received special education and related services from WCPSS.

4. *Student* succeeded academically through her sophomore year, taking Honors courses and generally making grades of "A" or "B." *Student* was recommended to take two Advanced Placement (AP) classes in her junior year. *Student* also was involved in some extracurricular activities and held a part-time job.

5. In August 2007, before the start of her junior year, *Student* took an overdose of Tylenol and was hospitalized briefly. *Student* began the school year a few weeks later. Her doctors provided no special instructions for her return to school. *Ms. P.K.*, a guidance counselor at ABHS, assisted Petitioners in adjusting *Student*'s schedule to drop the two AP classes from her schedule.

6. *Student* was under the care of a therapist and psychiatrist during the 2007-08 school year, and she was taking prescription medications including Prozac. Petitioners alerted

Ms. P.K. that *Student* was in therapy, but they did not inform any school personnel that *Student* was on medications. Petitioners did not provide any documentation to WCPSS regarding *Student*'s mental health diagnoses or treatment history while *Student* was a student at ABHS.

7. In the spring of 2008, Petitioners discovered that *Student* was in possession of marijuana. They did not inform the school of this discovery. *Student* lied to her parents about her marijuana use.

8. *Student* was involved in a romantic relationship with a male student at ABHS. Petitioners on at least one occasion forbid *Student* from seeing him. *Student*'s father was concerned that the relationship was becoming increasingly volatile.

9. Beginning in the spring of 2007, Petitioners became concerned about *Student*'s lying. Although *Student*'s father began driving her to school, *Student* did not always go directly to her first class and was frequently tardy. *Student* also left the school campus without permission during lunch period. Petitioners sought assistance from *Ms. P.K.* and ABHS Principal *Mr. S.G.* to try to keep *Student* on campus.

10. *Student*'s final grades for her junior year included one "A," two "B's", three "C's" and two "F's."

11. Throughout *Student*'s junior year, Petitioners were in occasional telephone and email contact with *Ms. P.K.* and some of *Student*'s teachers regarding *Student*'s emotional state, her grades and her attendance.

12. At the end of May 2008, Petitioners kept *Student* home from school for a few days. Petitioners did not inform the school as to why *Student* was absent or how long she would be gone.

13. On May 30, 2008, *Student* experienced an acute crisis and was admitted to Holly Hill Hospital in Raleigh, North Carolina, by her parents.

14. On or about June 3, 2008, a notice of *Student*'s hospitalization at Holly Hill was provided to WCPSS.

15. On or about June 5, 2008, Petitioners requested that WCPSS send *Student*'s school records to *PR Academy*, a therapeutic boarding school and residential treatment center in Utah. On June 6, 2008, upon *Student*'s release from Holly Hill Hospital, *Student* was taken by her parents directly to *PR Academy* in Utah.

16. *Student* did not return to ABHS after May 30, 2009. She was formally withdrawn as a student in the WCPSS on June 10, 2008.

17. At no time prior to *Student*'s withdrawal from WCPSS did her parents make a written request for referral of *Student* for evaluation for special education services. At no time prior to *Student*'s withdrawal from WCPSS did her parents provide written notice to the school that special education services were at issue or that they intended to seek reimbursement for *Student*'s enrollment at a private facility.

18. In July 2008, *Student*'s mother contacted *Mr. J.L.*, Director of Secondary Support Services for WCPSS, and told him that *Student* had been placed in residential treatment. Petitioners did not follow up with any written request for evaluation or referral for special education services.

19. On September 2, 2008, Petitioners' non-attorney advocate, J.B. (Lake Forest, California), wrote to WCPSS to request a copy of *Student*'s educational records and to request an IEP meeting to discuss *Student*'s "unique needs and educational planning." This letter also gave notice that Petitioners "are asking the District to fund [*Student*'s] unilateral placement." Ms. *J.B.* wrote a second letter on September 16, 2008.

20. On September 23, 2008, a Petition for a Contested Case Hearing pursuant to North Carolina General Statutes 150B-23 and 115C-109.6 was filed in this matter.

21. In response to Ms. *J.B.*'s letters, an IEP meeting was scheduled for October 24, 2008, to initiate the referral process and determine whether *Student* was eligible for special education services under the IDEA. The meeting was adjourned and continued until November 5, 2008, in order to give school personnel an opportunity to review a psychological evaluation of *Student* provided to them for the first time at the October 24th meeting.

22. At the November 5th meeting, the IEP team determined that additional evaluations were needed before a decision could be made regarding *Student*'s eligibility for special education services. Written consent for evaluation was given by *Student*'s mother on November 11, 2008. WCPSS personnel made repeated attempts from November 2008 through February 2009 to arrange for testing of *Student* in order to complete the evaluation process.

23. Except for a short period in December 2008, *Student* remained in Utah at the *PR Academy* facility from June 6, 2008, until March 2009. During this entire period, Petitioners did not make *Student* available for evaluation or testing by WCPSS in North Carolina. Petitioners did not inform Respondent, until after the fact, that *Student* had returned to North Carolina for a brief time in December.

24. *Student*'s placement at *PR Academy* was done at the recommendation of her treatment team at Holly Hill Hospital, in consultation with her therapist, in response to an acute emotional and psychiatric crisis, and for primarily therapeutic reasons. Petitioners selected *PR Academy* because the facility offered DBT therapy recommended by *Student*'s care providers.

25. *Student* attended school but did not receive special education services while at *PR Academy*, nor was an IEP developed for her at that facility. The educational component of *Student*'s program at *PR Academy* was incidental to the therapy and supervision she received. *Student* graduated from *PR Academy* with a high school diploma in March 2009, more than two months ahead of her peers at ABHS.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction of this contested case pursuant to Chapters 150B and 115C of the North Carolina General Statutes and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, and implementing regulations, 34 C.F.R. Part 300.

2. Under IDEA, the burden of proof in an administrative hearing is properly placed on the party seeking relief. *Schaffer ex. rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005). In this instance, Petitioners are the party seeking relief and therefore bear the burden of proof for the remedies sought. Respondent bears the burden of proof on their motion.

3. Before a child can be eligible for special education and related services under the IDEA, state or local education authorities must evaluate the child and determine that she is "disabled" within the meaning of IDEA. 20 U.S.C. § 1414(a)-(c). IDEA eligibility requires more than a diagnosis or a finding of a disabling condition. *See, e.g., Fauquier County Pub. Schs.*, 20 IDELR 579 (Va. SEA 1993).

4. If a parent or guardian unilaterally removes a child from the local public school system, the parent or guardian may obtain reimbursement for an alternative placement only if they are able to demonstrate that the regular school placement was inappropriate and that the alternative placement was appropriate. *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 373-374 (1985). In general, an LEA is not required to pay the costs of a private education if it made a free appropriate public education (FAPE) available to the child and the parents nevertheless elected to place the child in a private school or facility. 20 U.S.C. § 1412(a)(10)(C)(i).

5. One of the threshold requirements of IDEA is that "tuition reimbursement is only available for children who have previously received 'special education and related services' while in the public school system." *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150, 159 (1st Cir. 2004).

6. Even for a child who has received special education services in the public schools, parents "must at least give notice to the school that special education is at issue" before placing their child in a private school. *Greenland Sch. Dist.*, 358 F.3d at 160.

7. In accordance with 34 CFR 300.507, a due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint, or, if the State has an explicit time limitation for filing a due process complaint under this part, in the time allowed by that State law.

8. In accordance with N.C.G.S. § 115C-109.6., "Notwithstanding any other law, the party shall file a petition under subsection (a) of this section that includes the information required under IDEA and that sets forth an alleged violation that occurred not more than one year before the party knew or reasonably should have known about the alleged action that forms the basis of the petition."

9. Petitioners cite an August 2007 incident where, before the start of her junior year, *Student* took an overdose of Tylenol and was hospitalized briefly, as mandating an evaluation and review under Child Find requirements. *Student* began the school year a few weeks after the incident and her doctors provided no special instructions for her return to school. Moreover, the August 2007 incident is more than the one year from the filing of Petitioners' Petition for a Contested Case Hearing.

10. A claim for reimbursement may be denied or reduced if the parents do not give written notice to the LEA, at least 10 business days prior to removing the child from public school. 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(bb); N.C. 1501-8.1(d). Such notice must include a statement of the parents' concerns and of their intent to enroll their child in a private school at public expense. *Id*.

11. Petitioners' claim for reimbursement is denied because Petitioners have presented no competent evidence that they provided adequate, timely or written notice to the Respondent of their educational concerns or their intent to withdraw *Student* from school and enroll her in a private facility at the LEA's expense. 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(bb); N.C. 1501-8.1(d).

12. The Wake County School system did not fail to timely evaluate, assess and discuss *Student* for possible entry into the special education program. Petitioner's evidence does not show that the school system had sufficient knowledge of the totality of *Student*'s medical condition and medications which would have prompted school staff to request an assessment of *Student* for a special education program and services until some three months after *Student* had been unilaterally removed from the Wake County School system and placed in *PR Academy,* a therapeutic boarding school and residential treatment center in Draper, Utah.. Further, incidents regarding *Student*'s behavior in school that was observed and/or revealed the year prior to the filing of the petition, did not rise to the level of suspicion to prompt assessment by the school.

13. *Student* has never been identified as a student with special needs nor been identified as eligible for special education services under IDEA by any public or private school.

14. For reimbursement claims under IDEA, the standard is whether a child's placement is "considered necessary for educational purposes, or whether the placement is a response to medical, social, or emotional problems that is necessary quite apart from the learning process." *Clovis Unified Sch. Dist. v. California Office of Admin. Hearings*, 903 F.2d 635, 643 (9th Cir. 1990). *See also, e.g., Butler v. Evans*, 225 F.3d 887 (7th Cir. 2000). "If residential placement is necessitated by medical, social, or emotional problems that are segregable from the learning process, then the local education agency need not fund the residential placement." *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 980 (4th Cir. 1990). The records and testimony produced by Petitioners are insufficient as a matter of law to establish that a private, out-of-state residential treatment facility was necessary to meet *Student*'s educational needs.

15. Taken in the light most favorable to Petitioners, the evidence produced does not show that *Student* needed "specially designed instruction" or that she received "specially designed instruction" at *PR Academy*. 34 C.F.R. § 300.39 (a)(1); N.C. 1500-2.34(a). Petitioners are not entitled to reimbursement as a matter of law. 20 U.S.C. § 1412(a)(10)(C)(ii); N.C. 1501-8.1(c).

16. Parents' right to seek reimbursement under IDEA for unilateral private placement is subject to their cooperation in the evaluation and placement process. *See Patricia P. v. Board of Education of Oak Park*, 203 F.3d 462, 468 (7th Cir. 2000). "[P]arents who, because of their failure to cooperate, do not allow a school district a reasonable opportunity to evaluate their disabled child, forfeit their claim for reimbursement for a unilateral private placement." *Id.* at 469. Respondent has produced competent evidence sufficient to establish that, once consent for evaluation was given, Petitioners failed to cooperate and did not allow the district a reasonable opportunity to evaluate *Student* for eligibility under the IDEA.

17. The Petition included a claim for reimbursement of tuition and other expenses incurred by Petitioners for *Student*'s placement at *PR Academy* from June 6, 2008, through March 2009. This claim includes the summer months when *Student* would not have attended school if she was still enrolled in the WCPSS. In this case, there is no basis for reimbursement of Petitioners for services beyond the normal school year of the LEA. N.C. 1501-2.4(b)(1). *See also M.M. v. District of Greenville County*, 303 F.3d 523 (4th Cir. 2002).

18. The North Carolina General Assembly assigned responsibility for conducting special education due process hearings to the Office of Administrative Hearings (OAH). The OAH conducts those hearings arising out of the IDEA and State law in accordance with N.C.G.S. § 115C-109.6 *et seq.* and N.C.G.S. § 150B-23 *et. seq.*

19. "The IDEA specifically provides for two approaches to administrative challenges. A parent is entitled to "an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency." 20 U.S.C. § 1415(f)(1)(A). If the state elects to allow the

local educational agency to conduct the due process hearing, it must provide for an appeal to the state educational agency. *Id.* § 1415(g)(1). If the due process hearing is held by the state, no appeal is required. The former system is often referred to as a two-tiered system, while the latter is known as a one-tiered system." *Wittenberg v. Winston-Salem/Forsyth County Board of Education*, 2006 WL 2568937 *1 (M.D.N.C.)

20. "North Carolina has adopted a modified two-tier system, in which both levels are conducted by the State." Neither IDEA nor the federal regulations contemplate a situation in which a hearing conducted by the state will be appealed to the state. *Wittenberg v. Winston-Salem/Forsyth County Board of Education*, 2006 WL 2568937 *1 (M.D.N.C.)

21. In accord with N.C.G.S. § 150B-34, the administrative law judge shall make a decision that contains findings of fact and conclusions of law and return the decision to the agency for a final decision. Harmonizing the provisions of § 150B with § 115C, N.C.G.S. § 150B-36 shall apply to a decision in special education matters appealed to a state review officer. (A court should not construe a statute in such a way that renders part of it meaningless. *Wilkins v. North Carolina State University*, 178 N.C. App. 377, 379, 631 S.E.2d 221, 223 (2006)).

FINAL DECISION by SUMMARY JUDGMENT

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above. Based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned grants Respondent's Motion for Summary Judgment.

NOTICE

In accordance with the Individuals with Disabilities Education Act and North Carolina's Education of Children with Disabilities laws, the parties have appeal rights.

Under federal law and in accordance with 20 U.S.C. § 1415(f) the parents involved in a complaint "shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency." A decision made in a hearing conducted pursuant to (f) that does not have the right to an appeal under subsection (g) may bring civil action in State court or a district court of the United States. *See* 20 U.S.C. § 1415(i).

"North Carolina has adopted a modified two-tier system, in which both levels are conducted by the State." *Wittenberg v. Winston-Salem/Forsyth County Board of Education*, 2006 WL 2568937 *1 (M.D.N.C.)

Under North Carolina's Education of Children with Disabilities laws (N.C.G.S. §§ 115C-106.1 *et seq.*) and particularly N.C.G.S. § 115C-109.9, "any party aggrieved by the findings and decision of a hearing officer under G.S. 115C-109.6 (a contested case hearing). . . may appeal the findings and decision within 30 days after receipt of notice of the decision by filing a written notice of appeal with the person designated by the State Board under G.S. 115C-107.2(b)(9) to receive notices." The State Board, through the Exceptional Children Division, shall appoint a Review Officer who shall conduct an impartial review of the findings and decision appealed.

In North Carolina, in which the hearing is conducted by the state and appealed to a state review official, the state review official's decision would be considered the "official position of the state educational agency." *Wittenberg v. Winston-Salem/Forsyth County Board of Education*, 2006 WL 2568937 *1 (M.D.N.C.)

The decision of the review officer is limited to whether the evidence in the record supports the findings of fact and conclusions of law and whether the conclusions of law are supported by and consistent with state and federal law. The review officer must also consider any further evidence presented in the appeal process. In accordance with N.C. Gen. Stat. § 150B-36 each finding of fact contained in the Administrative Law Judge's decision shall be adopted unless the finding is clearly contrary to the preponderance of the evidence in the record. For each finding of fact not adopted, the reasons for not adopting the finding of fact and the evidence in the record relied upon shall be set forth separately and in detail. Every finding of fact not specifically rejected as required by Chapter 150B shall be deemed accepted for purposes of judicial review. For each new finding of fact that is not contained in the Administrative Law Judge's decision, the evidence in the record relied upon shall be set forth separately and in detail establishing that the new finding of fact is supported by a preponderance of the evidence in the official record.

Inquiries regarding further notices and time lines, should be directed to the Exceptional Children Division of the North Carolina Department of Public Instruction, Raleigh, North Carolina.

IT IS SO ORDERED.

This the 18th day of June, 2009.

Augustus B. Elkins II
Administrative Law Judge